IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

ARISTO VOJDANI and
IMMUNOSCIENCES LAB, INC.,

OPINION AND ORDER

Plaintiffs,

10-cv-37-wmc

v.

NEUROSCIENCE, INC. and
PHARMASAN LABS, INC.,

Defendants.

Two motions have been pending before the court for far too long: (1) defendants' motion for reconsideration of a May 19, 2011, order (dkt. #352); and (2) plaintiffs' motion for judgment as a matter of law or, in the alternative, for a new trial (dkt. #347). Both motions will be denied.

This case has a long and convoluted history, including two trials presided over by different judges. The original dispute arose out of a business relationship between the parties in 2007, involving the medical testing of patient specimens. Under the arrangement, plaintiffs Aristo Vojdani and Immunosciences Lab, Inc. provided testing materials and methods and defendants Neuroscience, Inc. and Pharmasan Labs, Inc. ran the tests in the laboratory and sent the results to the health care provider who ordered the test.

After the relationship fell apart, plaintiffs sued defendants under various state law theories (and defendants filed counterclaims against plaintiffs). The parties' pending

motions, however, only concern the breach of contract claim. After the original trial, the jury was asked to answer two questions related to that claim. Question No. 1 asked, "Has plaintiff ImmunoSciences Lab, Inc. proven by a preponderance of the evidence that defendant NeuroScience, Inc. agreed in the June 21, 2007, letter of intent (first paragraph under the heading 'Pricing') to pay plaintiff the invoiced amount for each LDA (laboratory-developed assay) plate sent to defendant NeuroScience whether the plate was sold to a client or not?" The jury answered "yes." Question No. 2 asked, "Has plaintiff ImmunoSciences proven by a preponderance of the evidence that defendant NeuroScience did not pay plaintiff the full amount of the invoices for the LDA plates plaintiff supplied?" The jury answered "no." (Dkt. #223.) As a result of the jury's answer to Question No. 2, defendants prevailed on the breach of contract claim.

Plaintiffs filed a motion for a new trial on the ground that the jury's answer to Question No. 2 was inconsistent with the undisputed evidence at trial. In particular, plaintiffs argued that all witnesses who testified on this issue, including Mieke Kellermann (the chief financial officer for defendant NeuroScience and the president of defendant Pharmasan), agreed that defendants did not pay "the full amount of invoices," so the jury's answer to this question was against the great weight of the evidence. In response, defendants argued that evidence at trial would allow a reasonable jury to infer that the parties had agreed to modify their written agreement such that defendants "had fulfilled their payment obligation." (Dfs.' Br., dkt. #262, at 7.)

In an order dated May 19, 2011 (dkt. #267), Judge Crabb agreed with plaintiffs:

> The problem with defendants' argument is that Question No. 2 does not address what the parties' agreement was; that is addressed by Question No. 1. (Defendants do not challenge the jury's answer to Question No. 1 as legally insufficient.) Question No. 2 simply asks whether defendants paid the invoices. Tellingly, defendants never address the language of the special verdict question in their briefs. Instead, they paraphrase it in various ways as asking whether defendants paid what was "owed" or whether defendants made "full payment." However, the question relates specifically to the invoices. Defendants point to no evidence that they paid these invoices.

Id. at 14. Consistent with this conclusion, Judge Crabb granted plaintiffs' motion and scheduled a new trial on the breach of contract claim.

A few weeks before the new trial, plaintiffs filed what they called a "motion for clarification" of the court's May 19 order, now arguing that no trial was needed and that the court should simply enter judgment in their favor. (Dkt. #298.) Plaintiffs' motion was built on a series of premises. As an initial matter, they argued that the scope of any new trial would have to be limited to asking the jury the same Question No. 2 asked in the first trial, because it would violate their rights under the Seventh Amendment to submit Question No. 1 again or to otherwise ask the jury to determine the scope of the parties' agreement. Because it was undisputed that defendants did *not* pay the full amount of the invoices, they then argued that there was only one reasonable answer to the question, making submission of this liability question pointless. Finally, plaintiffs argued that it was unnecessary to submit even a damages question to the jury because the

parties had stipulated that the difference between the amount invoiced and the amount paid was $846,695.39.

In an order dated October 11, 2011 (dkt. #315), Judge Crabb agreed with plaintiffs that the original jury's answer to Question No. 1 should not be revisited in the new trial because neither side had challenged that portion of the verdict. However, she rejected plaintiffs' contention that they were entitled to judgment as a matter of law and their alternative position that the scope of any new trial was limited to the question whether defendants paid the full amount of the invoices. Instead, she concluded that "it would be both unreasonable and unfair simply to ask the jury the same question that required a new trial in the first place." (Dkt. #315, at 5-6.) Judge Crabb explained:

> [P]laintiffs' motion ignores the problem with the verdict that I identified in the order granting their motion for a new trial. In particular, Question No. 1 asked the jury to determine the scope of the "letter of intent"; Question No. 2 asked the jury to determine whether defendants paid the full amount of the invoices. However, contrary to plaintiffs' assertion, *neither* question asked the jury to determine whether defendants breached an agreement with plaintiffs.
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> . . . [D]efendants' position during the trial and now is that, to the extent the written agreement required them to pay plaintiffs the invoiced amount, the parties modified the terms of the "letter of intent" in later dealings. Unfortunately, that issue was not addressed in the special verdict form in the first trial.

Id. at 4. Judge Crabb further concluded that defendants had not waived the modification issue because they sought (unsuccessfully) to include it in the verdict form during the jury instruction conference. (Dkt. #241, at 41-42.)

As a result of a scheduling conflict with another trial, the case was reassigned at that point to Judge Conley, who presided over the second jury trial. That jury found the parties had in fact modified their agreement on December 31, 2007, to allow defendants to pay plaintiffs "50% of the actual revenue derived from monthly sales for testing using the LDA plates, rather than the invoiced price for each plate." (Dkt. #336.) The parties then stipulated to damages in the amount of $187,000. (Dkt. #339.)

In the current motions before the court, the parties repeat arguments that Judge Crabb rejected before the second trial. Defendants argue in their motion that the original jury's answer to Question No. 2 was consistent with the evidence. Plaintiffs argue that the second trial should not have included the issue of modification.

Plaintiffs' arguments are particularly weak. The jury in the first trial found in *defendants'* favor on the breach of contract claim. Plaintiffs did not seek judgment as a matter of law on that claim and they have never argued that they were entitled to judgment as a matter of law at *any* point during the first trial. Rather, plaintiffs' sought a new trial on the ground that the jury's verdict did not make any sense, asserting that the first jury was plainly confused about both the evidence and the issue it was being asked to decide. Having prevailed on their motion for a new trial, it is somewhat audacious for plaintiffs to then argue that the court is prohibited from attempting to rectify this apparent confusion at the second trial. Not surprisingly, in the many briefs they have filed on this issue, plaintiffs have yet to cite any authority supporting this argument.

Indeed, neither side cites any relevant law or facts in their motions that they have not presented to this court before. Generally, "a successor judge is discouraged from reconsidering the decisions of the transferor judge. The successor judge should depart from the transferor judge's decision only if he has a conviction at once strong and reasonable that the earlier ruling was wrong, and if rescinding it would not cause undue harm to the party that had benefitted from it." *Gilbert v. Ill. State Bd. of Educ.*, 591 F.3d 896, 902 (7th Cir. 2010) (citations omitted). Neither side even acknowledges this standard and the court sees no reason to overturn Judge Crabb's previous rulings. On the contrary, the second jury's verdict is not only eminently reasonable on the evidence presented in its own right, but clears up any arguable confusion in the first jury's verdict. Just as Judge Crabb recognized in ordering a new trial, both juries obviously found that the parties had modified their agreement to allow defendants to pay less than the full amount. The second jury's express finding of that fact is *no* basis to revisit the first jury's implicit finding, much less Judge Crabb's generous ruling for plaintiffs which allowed them a second kick at their breach of contract claim. On the contrary, this judge has a conviction "at once strong and reasonable" that plaintiffs have been granted abundant opportunities to prevail on this claim and having failed, that it would be an undue hardship on the parties and this court to revisit the claim any further.

ORDER

IT IS ORDERED that

1) The motion for reconsideration filed by defendants Neuroscience, Inc. and Pharmasan Labs, Inc. (dkt. #352) is DENIED.

2) The motion for judgment as matter of law, or, in the alternative, for a new trial filed by plaintiffs Aristo Vojdani and Immunosciences, Lab, Inc. (dkt. #347) is DENIED.

Entered this 4th day of January, 2013.

BY THE COURT:

/s/

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WILLIAM M. CONLEY
District Judge